

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.573 OF 2005

Dattatraya Bala Waghawale
res. at Wadgaon-Maval,
Tal: Maval,
Dist: Pune

..Appellant

versus

Shri Sohanlal Hirachand Bafna
res. at Wadgaon-Maval,
Tal : Maval,
Dist: Pune

..Respondent.

Mr. M.R.Katkar for the Appellant

Mr.Navin B. Shah for the Respondent

**Coram : S.R.Sathe, J.
Dated : 12th April, 2006**

JUDGMENT

1. Appellant, the Original Defendant in Regular Civil Suit No.201 of 1985 has preferred this appeal against the judgment and order passed by the Court of 4th Additional District Judge, Pune in Civil Appeal No.1002 of 1998 whereby the judgment and order passed by the trial Judge decreeing the plaintiff's suit for specific performance was confirmed and the appeal was dismissed. For the sake of convenience hereafter the parties shall be referred to as plaintiff and defendant.

2. Brief facts giving rise to this appeal are as under :

. The land bearing Survey No.194/3A and 4B/2 admeasuring 19.5 Hectare situated at Wadgaon, District Pune, described in detail in para 1 of the plaint was owned and possessed by the defendant. He was in fact a tenant in the said land as on 1.4.1957. As a result of the same there was proceeding under Section 32G of the Bombay Tenancy and Agricultural Lands Act (hereafter referred to as BTAL Act) and certificate under Section 32M of the BTAL Act was granted in his favour. As a result of the said position it was necessary for him to seek permission from the appropriate authority for sale of the said land. On 12.3.1973 the defendant agreed to sale the suit land to plaintiff for Rs.2750/- and also promised to execute the sale deed after obtaining necessary permission from the Revenue Authorities. The defendant accepted earnest amount of Rs.500/- and also handed over the possession of the suit land to plaintiff. However, plaintiff's name was not entered in the record of rights. He constructed house in the suit land and

also dug a well. Not only that, but some portion of the said land was leased out by him for nursery. After the execution of Agreement to Sale, on 27.4.1973 plaintiff paid amount of Rs.1000/- to defendant. Similarly, on 30.9.1973, he paid amount of Rs.850/- and Rs.400/- on 5.10.1973 to the defendant. The defendant acknowledged the said amounts by making necessary endorsement on the agreement to sale. However, the defendant did not obtain the necessary permission from the Revenue Authorities for long time. Ultimately, he filed application and the concerned authority granted permission to sale land by virtue of order dated 12.2.1985. Inspite of the same, the defendant did not execute the sale deed. Hence, plaintiff filed the present suit for specific performance of agreement to sale on 17.12.1985.

4. The defendant filed written statement at Exhibit 16 and opposed the suit claim. He contended that his father was tenant in the suit Survey Number. However, he being the eldest member in the family, the land was entered in his name after the death of his father. According to him, his brothers and sisters were also having share in the suit land

and as partition had not taken place between them he alone had in fact no right to sale the suit land or to enter into an agreement for the same. The defendant also contended that taking advantage of the fact that he often used to visit plaintiff's grocery shop, the plaintiff obtained his signatures on some blank papers and that he has not actually received any amount from the plaintiff. The defendant, therefore, contended that the plaintiff's suit is false and liable to be dismissed.

5. On these pleadings, the learned trial Judge framed issues at Exhibit 17. In order to prove the suit claim the plaintiff examined himself at Exhibit 29 and three other witnesses namely Popat Dattatraya-Exhibit 46, S.K.Nayak- Exhibit 48 and Bhau Tulsiram-Exhibit 51. As against this, the defendant examined himself at Exhibit 52. Both the parties produced certain documents. After considering the evidence adduced by both the parties, the learned Trial Judge came to the conclusion that defendant has failed to prove that the suit agreement was got executed by fraud or misrepresentation. He also held that the suit agreement was executed by the defendant and

plaintiff was all along ready and willing to perform his part of the contract, however, the defendant committed breach. The learned Trial Judge, therefore, passed decree for specific performance in favour of the plaintiff.

6. Being aggrieved by the said order, the defendant filed Civil Appeal No.1082 of 1988. However, the same came to be dismissed.

7. Being aggrieved by the same, the original defendant has filed the present Second Appeal. While admitting the appeal, this Court, (Coram B.N.Srikrishna, J.) as His Lordship was then, passed the following order:

"Admit. b, d and g are the substantial questions of law"

the same are as follows:

b) The appellant respectfully submit that the Appellant is the owner of the suit properties being survey Nos.194/3-A and 4-B/2 admeasuring 00 hectare 19.5 ares. This very land is situated at village Wadgaon, wherein there is a grampanchayat. This very suit land is situated within the

jurisdiction of the Grampanchayat, Wadgaon. The Appellant is the owner of the suit property. It is further to be noted that the Appellant's father Bala is the tenant of the suit land and, thus, the suit land was cultivated by the Appellant's father who was the tenant of the suit land on 1st April 1957, that is on the Tillers day. The Appellant's father expired and the Appellant being the Karta of the joint family his name is entered in the 7X12 extract of the suit land. The Appellant has got the following brothers and sisters.

1. Hanmanta Bala Waghawale
2. Madhukar Bala Waghawale
3. Kisan Bala Waghawale
4. Sudham Bala Waghawale
5. Someshwar Bala Waghawale
6. Barker Bala Waghawale
7. Sonabai Bala Waghawale
8. Kedarbai Bala Waghawale
9. Shashikala Bala Waghawale and
10. Smt.Vithabai Bala Waghawale

d) The Appellant respectfully submit that no partition amongst the members of the Joint Hindu Family has taken place. The brothers of the Appellant are cultivating the suit land personally and, therefore, the Respondent-plaintiff has no concern over the suit land. The Appellant and his brothers are cultivating the suit land and, hence, a substantial question of law arises with regard to their respective shares in the suit property.

g) The Appellant respectfully submits that the agreement, dated 12th March, 1973 is clearly time-barred and no reliefs can be granted by the Courts below for specific performance of the said agreement.

8. In this appeal before me, the only point that has been urged by the learned Advocate for the

Appellant is that originally the plaintiff's father was a tenant in the suit land. Even on 1.4.1957 plaintiff's father was a tenant. He expired and the appellant became tenant and karta of the joint family and as such the other heirs namely brothers and sisters of defendant are also having share in the suit land and therefore the agreement executed by the defendant alone is not legal and valid. It was therefore submitted that the decree passed by the courts below is illegal. As against this, the learned Advocate for the respondent supported the judgment and decree passed by the courts below.

9. At the outset it must be mentioned that the agreement to sale in question, Exhibit 38 has been executed only by the defendant Dattatray Bala Waghmale. It is nowhere mentioned in the said agreement that the land in question was originally owned and possessed by his father or that his name was entered in the record of rights as "Karta" or "Manager" of the Joint Family. It must also be noted that the defendant has not adduced any cogent and convincing evidence to show that the suit land was initially owned by his father and it was entered in his name, he being the Karta of the family. On

the contrary, he has admitted that even during the tenancy proceeding he paid the amount and the land was transferred in his name and 32M Certificate was also granted in his name. So, now it does not lie in his mouth to say that the land is of the joint family and as there are other sharers, the plaintiff is not entitled for specific performance.

10. It is pertinent to note that the defendant has not examined any of his brothers or sisters. Nobody has come forward to challenge the legality and validity of the suit agreement in question. So, we find that it is only with a view to avoid execution of sale deed, now the defendant is trying to put forward the contention that the land was of the joint family and he is the manager of the joint family. If it is so, it may equally be argued that he executed the agreement in question in his capacity as Karta. Then in that event it was necessary to find out whether there was necessity to sale the land and whether the transaction in question was for legal necessity etc. However, there are no pleadings to that effect. No one has challenged the agreement to sale on that count. So, there is no substance in the contention raised by

the defendant in this behalf.

11. Both the courts below have rightly considered the entire evidence on record and have correctly held that the suit agreement is legal and correct. The plaintiff was all along ready and willing to perform his part of the contract. He was put in actual possession of the land as part performance. The learned trial Judge therefore granted decree for specific performance in favour of plaintiff. Findings recorded by the courts below are legal and correct. There is no necessity to interfere with the same. Hence the appeal is dismissed with costs.

(S.R.Sathe, J.)

